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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,

Petitioner,

v.

LONG ISLAND RAILROAD COMPANY
and
METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

On Writ of *Certiorari*
to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Does the immunity for State sovereignty reaffirmed in *National League of Cities v. Usery* preclude application of the Railway Labor Act to structure the determination of employment conditions by a State-owned and operated commuter railroad?

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BRIEF FOR THE RESPONDENTS

STATEMENT

This case calls upon the Court to decide whether Congress may impose its decisions regarding the structure of labor relations in the public sector upon a State transit agency which provides local commuter rail service to a region dependent on public transportation. Respondent Metropolitan Trans-

portation Authority (the "MTA"), an agency of the State of New York, owns and operates the Long Island Railroad (the "LIRR"), which transports 260,000 riders every day along rail lines connecting Nassau and Suffolk Counties on Long Island with terminals in New York City. The MTA also owns and operates the New York bus and subway systems, as well as various bridges and tunnels which comprise part of the commuter transportation network for the metropolitan region.[1]

The MTA and its affiliated agencies have a work force of some 53,000 employees. But for the 6,800 employees of the LIRR, all the MTA's workers are covered by the New York Public Employees' Fair Employment Act (the "Taylor Law"), N.Y. Civ. Serv. Law §§ 200-214 (McKinney 1973 & Supp. 1980-81),[2] pursuant to which they are organized into various bargaining units—including one unit of more than 33,000 bus and subway workers—that engage in collective negotiations with the MTA. The relationship between these 46,000-plus employees and the Authority is governed by the impasse procedures set forth in the Taylor Law, which expressly prohibits all strikes by public employees and subjects both labor

[1] The MTA carries out these functions in part through its statutory status, N.Y. Pub. Auth. Law, § 1264 (McKinney 1970), as the ex officio board of the New York City Transit Authority (NYCTA), §§ 1200-21; the Triborough Bridge and Transit Authority, §§ 550-71; and the Manhattan and Bronx Surface Transit Operating Authority, a subsidiary of NYCTA, § 1203-a. Pursuant to its power to form subsidiaries, the MTA controls the LIRR, the Staten Island Rapid Transit Operating Authority, the Metropolitan Suburban Bus Authority, the Stewart Airport Land Authority, and the Metropolitan Airport Authority. § 1266(5).

[2] The Staten Island Rapid Transit Operating Authority (SIRTOA), which employs 280 workers, may also be subject to the Railway Labor Act. *See Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Transit Operating Auth.*, Finance Dkt. No. 29011 (ICC Nov. 8, 1979).

organizations and individual employees to a variety of penalties in the event of a violation of this no-strike rule.[3]

By contrast, Congress has imposed on the LIRR and its employees the very different procedures of the Railway Labor Act (the "RLA"), 45 U.S.C. §§ 151-163 (1976). Solely because the LIRR carries some freight cars which it interchanges in Queens with interstate freight lines—a service accounting for only 4% of the railroad's revenue[4]—the LIRR is a "carrier" subject to the Interstate Commerce Act, 49 U.S.C. § 10501(a)(Supp. III 1979), and is therefore subject to the RLA. Under the procedures of the RLA, the LIRR's employees have organized into 23 bargaining units represented by 17 separate labor organizations.[5] And unlike virtually all other

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[3] The Taylor Law provides that labor organizations involved in a strike will lose their right to dues check-off privileges for a period determined by the State Public Employment Relations Board, and that individual striking employees will be penalized two days' pay for each day of a strike. N.Y. Civ. Serv. Law § 210 (McKinney 1973 & Supp. 1980-1981.) In addition, the State courts are authorized to impose contempt sanctions for actions violating injunctive orders against a strike. In the 1980 New York City bus and subway strike, each of these penalties was imposed. The striking unions lost dues check-off rights for eighteen months. *In re TWU, Local 100,* 14 PERB ¶3074 (1981).

[4] Between 1966 and 1979 LIRR passenger operations increased from 73.65 million passengers to 77.38 million. But freight activity declined dramatically, from 113,965 cars or 11.8% of all revenue in 1966 to only 40,936 cars or 4% of all revenue in 1979. Jt. App. 39, 41, 49. In contrast to the $12.1 million freight revenue reported by MTA, Jt. App. 49, Petitioner's Brief (p. 11) claims that freight operations generated $19 million in 1979. The discrepancy is attributable to Petitioner's inclusion of a "freight surcharge" imposed in 1973 to offset a Congressional increase in railroad retirement taxes on passenger operations. Jt. App. 49. On August 7, 1981, the Interstate Commerce Commission found the surcharge to be illegal and ordered the LIRR to make refunds retroactive to 1973. ICC *Ex parte* No. 299 (Sub. No. 1) and No. 36874 (1981), *appeals docketed,* No. 81-4139 (2nd Cir. Aug. 7, 1981) and No. 81-4306 (5th Cir. Aug. 7, 1981). On the basis of freight car miles, freight service accounted for only 2.1% of passenger activity. Jt. App. 35. Moreover, the LIRR is exclusively a terminal line; 90% of its freight traffic terminates in Nassau or Suffolk Counties. By any measurement, the LIRR is overwhelmingly a railroad engaged in intrastate commuter transit service.

[5] One bargaining unit has only five employees, while another represents twelve workers. Jt. App. 52.

MTA employees, the LIRR unions are permitted to bargain over pension benefits, a subject withdrawn by statute from collective negotiations in the public sector for New York State employees. 1973 N.Y. Laws, ch. 382, § 6. Also unlike all other MTA employees, they do have the right to strike, after exhausting the impasse procedures specified by the Federal law. Just this year, Congress amended the federal act, thus making explicit its imposition of the RLA's procedures on State transportation agencies by adopting special rules for public commuter railroads, including the MTA.[6]

Like the MTA's bus and subway lines, the LIRR began as a privately-owned, profit-making enterprise, and was transformed into a public service by force of economic circumstance. In 1966 the State of New York acquired the LIRR stock because its private owner, the Pennsylvania Railroad, could no longer afford to operate it and absorb the rapidly expanding losses from the LIRR passenger service.[7] The State assumed the

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[6] In the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1157, Congress added a new Section 9A to the RLA, specifically applicable to state agencies providing commuter rail services. Under these amendments, the President is obliged to appoint two successive Emergency Boards upon request by the Governor, the commuter rail authority or the union involved in a continuing labor dispute which the National Mediation Board procedures have failed to resolve. Section 9A(b), (c)(1), (e). Each appointment of a Board triggers a 120-day "cooling off" period. Sec. 9A(c), (e)-(h). The Second Board is obliged to select among "final offers" of settlement from each party. Section 9A(f) and (g). The statute also seeks to induce settlement by providing that the party refusing to accede to the Board's final offer selection is precluded from receiving unemployment insurance benefits in the case of employees, or mutual assistance payments in the case of the authority, in the event a strike follows the expiration of all cooling-off periods. Sec. 9A(i), (j). These procedures may delay exercise of the right to strike by up to 240 days, but since the LIRR is obliged to bargain locally with each of its twenty-three units, Jt. App. 52, negotiations are virtually a year-round activity. It is likely that the unions will be prepared to wait out the new emergency procedures, if necessary, to make use of the legal right to strike in the RLA.

[7] The Long Island Railroad was placed under the jurisdiction of the MTA in 1968 and continued as a stock corporation until 1980, when the Authority transformed it into a public benefit corporation. Under State law, this action made railroad personnel State employees subject to the Taylor Law. N.Y. Pub. Auth. Law § 1265(9)(a) (McKinney 1970).

operation of the railroad in order to prevent its certain abandonment, and thus to continue a service vital to the economic and social well-being of the region.[8] N.Y. Pub. Auth. Law § 1260 (McKinney, 1970). Across the nation, transit has become increasingly a responsibility of State and local government. J.P. Womack & A. Altshuler, *An Examination of the Transit Funding Process at the Local Level* (May, 1979).

Petitioner United Transportation Union (the "UTU"), one of the 17 labor organizations representing LIRR employees, brought this action in the United States District Court for the Eastern District of New York on December 7, 1979, seeking a judgment declaring that the RLA governs the Union's relationship with the Long Island Railroad. Having exhausted the RLA's procedures in their pending labor dispute, the UTU struck the railroad the next day. The strike ended only after the National Mediation Board certified that Presidential intervention was warranted and the President of the United States convened an Emergency Board, 45 U.S.C. § 160 (1976), triggering a 60-day "cooling-off" period. Pet. App. 4a, 30a-31a.

Petitioner UTU thereafter moved for summary judgment. Rejecting the MTA's argument that under this Court's decision in *National League of Cities v. Usery,* 426 U.S. 833 (1976), application of the RLA to the LIRR unconstitutionally interfered with New York's freedom to structure labor relationships between its agencies and State employees, the district court concluded that the RLA did apply, preempting application of the State's Taylor law. To preserve the *status quo,* however, the

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[8] In 1970 the former chairman of the MTA testified before the United States Senate that "if the Long Island Railroad went out of existence tomorrow, it would take a minimum number of 26 lanes of expressway from Long Island in one direction and 26 coming out of the City to handle the traffic currently handled by the Long Island Railroad." *Effect of Railroad Mergers on Commuter Transportation: Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking & Currency,* 90th Cong., 2d Sess. 1138 (1968). He added that to provide the necessary additional parking for the commuters served by this railroad would require setting aside ten blocks in Central Manhattan. *Id.*

court enjoined petitioner from resuming its strike against the railroad pending the MTA's appeal. Pet. App. 48a.[9]

The Court of Appeals for the Second Circuit reversed, the panel unanimously concluding that the RLA as applied to the LIRR violates the immunity constitutionally assured to State governments against Federal regulations of commerce which infringe the States' protected autonomy interests. Finding that public commuter transit services qualify for this immunity and that the freedom to structure procedures for employee relations is a basic attribute of sovereignty, the Second Circuit held that the "RLA impairs the State's ability to structure employer-employee relationships in its role as sole provider of an essential public service," and is therefore invalid as applied to the LIRR under the principle articulated in *National League of Cities.*

In explaining its decision, the court of appeals distinguished *United States v. California,* 297 U.S. 175 (1936), and *California v. Taylor,* 353 U.S. 553 (1957), which sustained the application of the Federal Safety Appliance Act and the RLA, respectively, to the California State Belt Railroad. The state-owned rail line involved in those cases "was solely a freight service, the proceeds from which were used for harbor improvements." Pet. App. 16a-17a, *citing* 297 U.S. at 183. By contrast, the court found that the passenger transit service which forms the overwhelming proportion of the LIRR's business "is now of necessity provided almost exclusively by state and local governments, the service is essential to the public and inures to its benefit much more directly . . . [as a result] of the community wide need . . . . [and] a process of economic elimination of private suppliers." Pet. App. 17a-18a.

The court of appeals also rejected Petitioner's contention that the Federal interest in application of the RLA to the LIRR is so "demonstrably greater" as to "override a state's claim to immunity even in an area found to involve integral governmental functions." Pet. App. 15a. See *National League of Cities,* 426 U.S. at 856 (Blackmun, J., concurring); *Hodel v.*

[9] The negotiation between MTA and UTU was settled by an agreement on April 11, 1980. Pet. App. 6a, n.6.

Virginia Surface Mining & Reclamation Association, No. 79-1538 (June 15, 1981). "The State and its municipalities," said the court, "have a vital predominant interest in the continuous operation of its commuter passenger service." Pet. App. 24a. Like virtually every other State, New York had pursued this interest by tailoring labor relations for public employees to the special prerequisites of the public sector, including the almost universal prohibition on strikes by public workers.[10]

SUMMARY OF ARGUMENT

Uninterrupted transit service is the lifeblood of the New York metropolitan region. The transportation services supplied by New York's Metropolitan Transportation Authority carry six million passengers a day, or one of every three persons who use public transit in the entire nation. The Long Island Railroad is a crucial link in the network of commuter transit facilities that the MTA provides.

New York State is obliged to supply the public transit upon which New Yorkers depend because it has proved economically impossible for private entrepreneurs to furnish this essential service. The State's responsibility to safeguard its residents' economic and social well-being has thus made the provision of transit services, including the LIRR, fundamental to the fulfillment of the State's sovereign function. In New York, public dependence on commuter transit supplied by the State is so complete and constant that, more than any other function, transit dominates the political process and serves as the focal point for the individual's contact with government. From both perspectives, this commuter transit service bears no kinship to the freight activity of the State-owned railroads subjected to Federal regulation in *United States v. California*, 297 U.S. 175 (1936), *California v. Taylor*, 353 U.S. 553 (1957), or *Parden v. Terminal R. Co.* 377 U.S. 184 (1964).

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[10] *See Summary of State Labor Laws*, 1 [Ref. File] Gov't Empl. Rep. (BNA) 51:501-30 (April 20, 1981); Doherty, *Public Policy and the Right to Strike* in Public Employment Relations Services, Portrait of a Process—Collective Negotiations in Public Employment 251-268 (1979).

In 1981, no attribute of sovereignty is as essential to the separate existence of a sovereign State as the freedom to structure, to design and to implement procedures for resolving disputes between the State and its employees. Both the State's function as provider of basic public services and the State's role as regulator of private activity are exercised through its employees. Given the fundamental dependence of the public on commuter transit, Federal regulations compelling a State transit agency to permit strikes by transit employees, to follow Federal procedures for defining bargaining units, for administering labor contracts, for resolving impasses in labor negotiations, for determining the scope of bargaining and for responding to work stoppages displace the kind of sovereign decision-making central to the concept of State autonomy.

In *National League of Cities*, this Court recognized that a State's sovereign interests do not always find adequate protection in the political processes of the Congress. Notwithstanding the considerable influence afforded to the States by virtue of their role in the selection and composition of the National legislature, the Court has reasserted its responsibility to check congressional actions which intrude too severely on the States' freedom to choose "how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855.

New York's choices in structuring employer-employee relationships with the portion of its work force providing commuter transit service in New York City surely rank among its most basic policy decisions. Weighed against the State's concern that its political process not be distorted by labor relations procedures more suited to privately-owned transportation companies, the Federal interest in ensuring these employees the right to strike, the right to bargain over pensions, or the right to craft-based units for collective bargaining, pales to the vanishing point. The State is therefore constitutionally entitled to a judgment confirming its immunity from supervening Federal commands when it exercises its freedom to devise for itself a method by which it may accommodate its

employees' interests and the requirements of all its citizens for the basic public service of commuter transportation. Because it transgresses the immunity for State sovereign functions affirmed in *National League of Cities*, the application of the RLA to the LIRR exceeds the bounds of federal power and violates the Tenth Amendment to the Constitution.[11]

ARGUMENT

I. APPLICATION OF THE RAILWAY LABOR ACT TO THE LONG ISLAND RAILROAD VIOLATES NEW YORK STATE'S SOVEREIGNTY BY DIRECTLY DISPLACING THE STATE'S FREEDOM TO STRUCTURE ITS LABOR RELATIONS WITH ITS EMPLOYEES.

In this case the Court squarely confronts for the first time the meaning of the rule announced in *National League of Cities*. In its resolution of the present dispute, the Court must decide whether *National League of Cities* is a precedent which reflects increased awareness of the States' constitutional responsibilities in our Federal system, or whether it is an aberration to be read as narrowly as possible and, ultimately, to become a derelict of constitutional law.

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[11] While the Tenth Amendment is frequently cited as the basis for the *National League of Cities* decision, the constitutional protection of State sovereignty is grounded in the States' independent role in the Federal system, which the framers had no choice but to accept. The States' autonomy was the "means and the price" of forming the nation. *See* Wechsler, *Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). This sovereign interest constrains the exercise of Federal power otherwise granted by the commerce clause. The Court's opinion in *National League of Cities* concluded that the amendments challenged there were "not within the authority granted Congress by Art. I § 8 cl. 3." 426 U.S. at 852. The Tenth Amendment, which expresses the principle that powers not delegated to the nation are reserved to the States and to the people, thus is used as shorthand for the immunity built into the structure of government established by the Constitution.

This Court held in *National League of Cities* that States are immune from Federal regulations of commerce which "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. This zone of immunity is required, said the Court, to protect the States' separate and independent existence in the face of national regulations which "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. In the specific dispute there at issue, congressional actions applying the minimum wage and maximum hour regulations of the Fair Labor Standards Act to public employers, Pub. L. No. 93-259, 88 Stat. 55, were held unconstitutional because those regulations, while admittedly within the reach of the national commerce power, "directly supplant[ed] the considered policy choices of the State's elected officials and administrators as to how they wish to structure pay scales in state employment," 426 U.S. at 848, a determination the Court recognized as an "undoubted attribute of state sovereignty." 426 *Id.* at 845. If the principle of *National League of Cities* is to survive as a meaningful precedent, the immunity it secures must surely reach a State's design of the structure of its employment relations with thousands of employees.

Last term, in *Hodel v. Virginia Mining & Reclamation* Association, No. 79-1538, slip op. at 21 (June 15, 1981) the Court elaborated the *National League of Cities* standard for defining the scope of a State's immunity from Federal regulation.

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States'. [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly

> impair their ability 'to structure integral operations in areas of traditional functions'. *Id.* at 852

In addition, the Court noted that there may be circumstances in which "the nature of the federal interest advanced may be such that it justifies State submission," notwithstanding the fact that these requirements are met. *Hodel v. Virginia Surface Mining Reclamation Association,* slip op. at 21 n.29.[12]

Petitioner UTU and *amicus* United States attach particular emphasis to the phrase, "traditional governmental functions," in the plurality opinion in *National League of Cities*—and to the Court's note that the holding, though not the language, of *United States v. California* survives, because the activity of common carriage by rail in interstate commerce is not such a function, 426 U.S. at 954 n.18. We submit that an informed reading of *National League of Cities* demonstrates that State rail transit facilities like the LIRR fall within the scope of the phrase used by the Court. Properly construed, this phrase means that immunity must turn on the fundamental dependence of the public on the service involved—not on a determination of whether State and local government or private investors supplied it during the nineteenth century.

In *National League of Cities,* this Court listed "fire prevention, police protection, sanitation, public health, and parks and recreation", 426 U.S. at 851, as well as "schools and hospitals", *id.* at 855, as examples of services the States have traditionally afforded. Yet a review of State or local activity in the first century of the nation's history reveals why immunity cannot be defined by a time-bound test. In New York City, for example, universal access to free public schools did not exist before 1842. Fire protection was "traditionally" (in the temporal sense) supplied in large part by insurance companies. The Legislature did not provide for a paid "Metropolitan Fire Department" until 1865. Until then, volunteer companies

[12] The *Hodel* case itself has no relevance here, since the Congressional regulation at issue there did not regulate the States as States, but rather preempted state regulation of a particular area of private economic activity.

competed to respond to fires, inspired by bonus payments offered by the insurance companies. Voluntary philanthropic and religious groups had primary responsibility for the development of hospitals and the provision of health care and other services to the poor. Private carters collected garbage until 1895, and the City had no day-time police service until 1844, when the night watch was abolished. See J. Wilson, ed., Memorial History of the City of New-York, Vol. III 385-88, 529-30 (1893); W. Bonner, New York The World's Metropolis 215-20, 233-34 (1924); D. Ravitch, The Great School War (1975). G. Sheldon, The Story of the Volunteer Fire Department of the City of New York (1882). The States' immunity from national control assured by the federalism principle in the Constitution must, therefore, turn on a functional evaluation of the public's need for the particular service involved and its dependence upon State or local government to provide it. [13]

Respondents demonstrate in greater detail in subsections (A)—(C) below how application of the specific tests articulated in *National League of Cities* and restated in *Hodel* compels invalidation of the RLA as applied to the LIRR. This result is even more apparent, however, if one considers the animating principles underlying the Court's recognition in *National League of Cities* of the need for judicial protection of the State's freedom to exercise the power of choice in public decision-making that characterizes and defines separate sovereignty.

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[13] In the broadest sense, of course, transportation services enabling people to travel from home to work surely rank among the oldest and most pervasive responsibilities of government. Since the nation was founded, governments have built and maintained streets, roads, canals and other arteries for the transport of people. In every community, the public agenda has included decisions concerning the allocation of tax resources among different modes of transportation. Today, the forms of public transit service vary from one part of the country to another, but each State and local government is involved in providing transportation facilities to its citizens. The Council of State Governments, The Book of the States 1980-1981 at 383-401 (1980).

The Values of State Sovereignty

In the adjudication of controversies involving the distribution of political authority between the nation and the States, the scope of constitutional protection cannot turn on verbal formulas; rather, it must rest upon enduring principles which define the ambit and limits of political power secured to each level of government in a Federal system. As Justice Cardozo said, dissenting in *Carter v. Carter Coal Co.*, "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective." 298 U.S. 238, 327 (1936). Both the reality of the State's zone of immunity from Federal regulation and the scope of the protection which the Constitution requires inhere in the goals which compel the immunity and the values which have commended it to this Court. From this perspective, petitioner's claim must fail primarily because it does not account for the economic reality and social urgency which place transit services—including bus, subway and commuter rail service—at the very top of the list of essential public services provided to the people of New York.

The rule of *National League of Cities* rests upon the recognition that there exist identifiable values of State sovereignty in the constitutional system; that these values may be jeopardized by the application of Federal commerce regulations to vital State activities; and that the Congress is not always sufficiently sensitive to the special role of State autonomy in the constitutional plan. Each of these points bears on the application of the Railway Labor Act to the LIRR, and each compels the conclusion that this commerce regulation cannot be applied to New York's commuter railroad.

The sovereignty of the separate States was not just a political axiom at the Constitutional Convention, but a precept firmly rooted in the theory of government which underlies the structure established by the Constitution. *See* The Federalist No. 46 (J. Madison); Diamond, *The Federalist on Federalism: 'Neither a National Nor a Federal Constitution, But A Composition of Both'*, 86 Yale L.J. 1273 (1977). That theory teaches that the existence and independence of the several

states serves to promote diversity, to increase opportunities for participation in the process of self-government, to foster experimentation in the design and delivery of public services, and ultimately, to enhance individual liberty. *See* B. Bailyn, The Ideological Origins of the American Revolution 172-75 (1967); on the advantages of local government to the futherance of these goals, *see* J. S. Mill, Utilitarianism, Liberty, and Representative Government, 225-29 (Everyman's ed. 1950). What is most pertinent to the issue now before the Court is the equally long-standing recognition that the essence of sovereignty is the power to choose: to design and structure those services most needed by the people. The State Capitol or the legislative chamber may be so much the symbolic representations of sovereign government that a State's separate and independent existence is threatened by Federal actions dictating their location, *see Coyle v. Oklahoma,* 221 U. S. 559 (1911), but it is in fact the freedom to decide that lies at the core of sovereign government. Sovereignty is defined by the power to determine which services are most needed by the people, which revenue sources most useful, which claims to these revenues most commanding; and by the freedom to prefer one service over another, using governmental powers to effectuate that preference. Throughout the nation's history, each State has made these choices through executive, legislative and judicial officers, and implemented them through those persons whom it hires to deliver services and administer the law. Today, more than 12.7 million persons work for State and local governments, including 920,000 in the State of New York. The Council of State Governments, The Book of The States 1980-1981 at 271 (1980).

In contemporary terms, sovereignty depends upon the power to set the level of taxes, to determine the types of levies imposed on state residents, and to allocate these receipts in response to public need for education, safety, health, environmental protection, transportation or other services. Basic to these allocative determinations is the question of the structure of employee relations between the State and its workers. In a State like New York—with annual State and

local government general revenue of $35.2 billion, The Book of the States at 302—the design of labor procedures is a key component of government decision-making. Indeed, whether to recognize a right to collective bargaining for public workers, how to define units for bargaining, how to resolve impasses, and what subjects may be raised in negotiation or determined through arbitration of grievances, have been matters of public debate and electoral controversy for many years in every State in the Union. Against this backdrop, the Congress has interposed a Federal regulation which commands New York to apply to a transit service essentially indistinguishable from other State transportation facilities procedures designed for and best suited to privately-owned railroads or airlines.

This Court established in *National League of Cities* that when Congress applies a commerce regulation not to the "shifting economic arrangements" of the private sector of the economy, *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), but to the States as States, it invades the process of political choice that is the essence of State sovereignty preserved by the Constitution. The issue is not whether the congressional objective is unsound, or whether the goal does or does not serve the national interest. Nor is it pertinent to inquire whether the Railway Labor Act or the Taylor Law represents a better judgment of public policy, or, for that matter, whether the judgment made by Congress is similar or dissimilar to that made by New York.[14] Rather, the central point is that in such critical areas of government services, the State needs the freedom to make its own choices. It needs the opportunity to make these decisions unwisely, even, limited only by the specific restrictions of the Constitution as they apply to State actions. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Perhaps most important in the *National League of Cities* decision is this Court's recognition that Congress may no longer

[14] *Cf.* Brief of United States at 31-34. On this policy judgment, of course, elected officials, union leaders, and academic experts vigorously differ. *See, e.g.*, H. Wellington & R. Winter, The Unions and the Cities (1972); Public Employment Relations Services, Portrait of a Process—Collective Negotiations in Public Employment (1979); B. Aaron, J. Grodin and J. Stern (eds.), Public Sector Bargaining (1979).

afford adequate protection to the States' autonomy interests. Changes, both structural and political, in our system of government have combined to reduce the influence of the States as States in the national legislature. The State's control over congressional districts and voter qualifications has been limited by legislation, Constitutional Amendment and decisions of this Court. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976); Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315 (codified at 42 U.S.C. §§ 1973b, 1973, 1973 aa to 1973 bb-4 (1976) (eighteen-year-old vote); *Oregon v. Mitchell,* 400 U.S. 112 (1970) (upholding eighteen-year-old vote for federal elections); United States Constitution, Twenty-sixth Amendment; *Wesberry v. Sanders,* 376 U.S. 1 (1964); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966); *Katzenbach v. Morgan,* 384 U.S. 641 (1966). In the political process, State party organizations have declined in influence. J. Saloma and F. Sontag, Parties: The Real Opportunity For Effective Citizen Politics (1972). The increased expense of political campaigns, together with campaign finance regulations, aid incumbents and reward candidates with personal fortunes or support from political action committees organized by corporate groups, trade associations and labor unions. In many elections, media has become more important to success at the polls than party loyalty. All these forces tend to lessen candidates' ties to the State as State. See D. Mayhew, Congress, The Electoral Connection (1978); Jacobson, *The Effects of Campaign Spending in Congressional Elections,* 72 Am. Pol. Sci. Rev. 469 (1978); Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3; *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam). The proportion of members of Congress with experience in State government has also declined. For example, in the Eightieth Congress, twenty-eight Senators had served as Governors, while in the Ninty-fifth Congress, only sixteen Senators had served as State Governors. A. Holcombe, Our More Perfect Union 205-06 (1950); M. Barone, G. Ugifusa, and D. Matthews, The Almanac of American Politics (1978) (*passim*). As a result of these and related changes, if the constitutional system mandates solicitude for State sover-

eignty, it must fall to the Court to provide the safeguards. *See generally* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role,* 79 Colum. L. Rev. 847 849-68 (1979).

Defining the scope of the States' immunity from commerce regulations may not always be simple,[15] but ease of adjudication cannot be the test for the viability of a basic constitutional principle. As the Court observed in *National League of Cities,* "[i]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their system for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence', *Coyle* [*v. Oklahoma*], 221 U.S. at 580." 426 U.S. at 851.

Thus, not only are the verbal tests of *National League of Cities* readily satisfied here, the fundamental principles underlying that decision compel invalidation of Congress' application of the Railway Labor Act to the labor relations of a State public transportation agency like the LIRR. The State of New York is plainly exercising its sovereign power in designing bargaining

[15] Justice Brennan's dissent expressed concern that the plurality opinion in *National League of Cities* articulated no effective limitation to the principle of immunity for State sovereignty. But his fear that the States might "engage in businesses competing with the private sector and then come to the courts arguing that withdrawing the employees of those businesses from the private sector evades the power of the Federal government to regulate commerce," 426 U.S. at 872, is unwarranted. The standard applicable to this case makes clear that a railroad like the California State Belt Line, which does provide a service commonly supplied by private investors, will not qualify for immunity; by contrast, a service such as the LIRR—critical to public welfare and supplied by the State—must be protected against Federal actions displacing the State's decision making authority.

Its lack of competition with private business also distinguishes the LIRR from the utility involved in *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, at 391 n.3, 403-08, 422 n.3 (1978). When parties are in a "competitive relationship such that each should be constrained, when necessary, by the federal antitrust laws," 435 U.S. at 422 n.3 (Burger, C.J., concurring), the fact that the State or its subdivisions is performing a "public function," in the sense that it is acting within its sovereign power, does not qualify it for protection. When, however, as in the case of the LIRR, the service is supplied solely by government and is one on which the public welfare depends, the case is strongest for judicial protection of the sovereign State's freedom to make policy choices.

procedures for State employees, in choosing to structure union organization on the basis of broader units of employees, in precluding the parties from negotiating pension benefits, and in banning all strikes by public workers. Each of these and other features of the Taylor Law represents a policy choice by the government of the State of New York, reached after full and feisty political debate. To allow the Federal government to cast these judgments aside and replace them with its own would have the effect of sanctioning a power that would "devour the essentials of state sovereignty" if unchecked. *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting), *cited with approval in National League of Cities*, 426 U.S. at 855.

A. APPLICATION OF THE RAILWAY LABOR ACT TO THE LONG ISLAND RAILROAD DISPLACES NEW YORK STATE'S FREEDOM IN THE EXERCISE OF AN ESSENTIAL AND TRADITIONAL GOVERNMENTAL FUNCTION.

In offering examples of State activities to which the sovereignty-based immunity from Federal commerce regulations must apply—including "fire prevention, police protection, sanitation, public health, parks and recreation"—this Court made clear that the list provided in *National League of Cities* was "obviously not an exhaustive catalogue," 426 U.S. at 851 n.16; the services illustrated were merely "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. The Court went on to indicate that "[i]ndeed, it is . . . services such as these which the States have traditionally afforded their citizens." *Id.* At various places in the decision, the description of the protected activities as "traditional governmental functions" was interchanged freely with their characterization as "integral" or "essential" services.[16]

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[16] State activities protected against Federal regulation were described as "integral governmental functions," 426 U.S. at 851 and 855; and "traditional governmental functions, 426 U.S. at 852. Each phrase describes those functions "essential to separate and independent existence." 426 U.S. at 845. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1172 (1977).

The clear import of the Court's approach in *National League of Cities* was that the constitutional immunity from Federal regulations commandeering a State's freedom of choice is triggered by public dependence on the particular government service at issue, not by its lineage or the length of time during which the State has been involved in its provision.[17] Governments provide services either because, like parks or correctional activities, no sufficient private interest exists or is likely to arise, or because, like schools and hospitals, the universal need commends the service to public officials concerned for the public welfare, notwithstanding the fact that it may be available to some through the private sector. In the case of urban mass transit, including bus, subway and commuter rail service, the lesson of the last three or four decades is that the economic reality makes private investment in these services unavailable. Government is left with the choice of abandoning the services, leaving the public to rely solely on private transportation, or of public ownership and operation of transit facilities.

Between 1940 and 1962 each of the subways and most of the bus lines in New York City came under public control. In the case of commuter rail service, the LIRR dropped straight from bankruptcy into public operation by a State agency. Other lines have gone through reorganization to control by federally chartered corporations or are subsidized by public funds while remaining in private hands. The State of New

[17] Except for one district court, the lower Federal courts have uniformly applied a functional rather than a time-bound test to qualify transit agencies for immunity from the Fair Labor Standards Act. *E.g., Kramer v. New Castle Area Transit Authority,* Civ. A. No. 80-1008G (W.D. Pa. June 11, 1981), *appeal docketed* No. 81-2223 (3d Cir. Aug. 10, 1981); *Dove v. Chattanooga Area Regional Transportation Authority,* Civ. A. No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed,* No. 81-5636 (6th Cir. Sept. 2, 1981); *Alewine v. City Council of Augusta, Georgia,* 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed, No. 81-7490 (5th Cir. June 5, 1981); see, contra., Joiner v. City of Macon,* Civ. A. No. 79-287-MAC (M.D. Ga. April 24, 1981), *request for permission to appeal filed* (5th Cir. June 14, 1981). The Sixth Circuit has also applied a functional test of public dependence to apply *National League of Cities* to a municipally owned airport. *Amersbach v. City of Cleveland,* 598 F.2d 1033 (6th Cir. 1979).

York now faces a choice of taking over the Westchester commuter rail service, or operating it through Amtrak with continued subsidies from the State.[18] Nationally, publicly owned transit systems (55% of the total) account for 90% of all vehicles, 93% of all vehicle miles and 94% of all passenger trips. American Public Transit Association, *Transit Fact Book* (1981 ed.) at 43. Thus, while there remain several hundred small, privately owned lines, by 1980 transit service had become overwhelmingly a public function in the United States. J. P. Womack & A. Altshuler, *An Examination of the Transit Funding Process at the Local Level* (May, 1979).

In each case, the State must choose whether to continue a particular service at State expense. Once it is under public control, the State government must decide how much of the cost for each ride is to be obtained from user fares, and how much from general tax revenues.[19] Of necessity, tax revenues are obliged to carry a large proportion of the cost. In the MTA, subsidies from Federal, State and local government account for 49% of operating costs on the bus and subway system, and 56% on the Long Island Railroad. MTA 1981 Operating Budgets.

In an environment such as New York City, abandonment of public transportation is not a realistic option, for economics,

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[18] The MTA now contracts with ConRail for the Hudson and Harlem commuter line serving Westchester County, and, together with Connecticut, also subsidizes ConRail service on the New Haven Railroad. Under these contracts, the States are responsible for funding all operating deficits and capital improvements as well as for all decisions on fares, schedules, consists and service standards. This year, Congress gave the States responsible for these commuter railroads an option of direct take-over or continuation of the service by Amtrak Commuter, the newly created federal entity responsible for commuter passenger rail service. Northeast Rail Service Act of 1981, Pub. L. No. 97-35, § 1137, 95 Stat. 648-52. Unless the State fully subsidizes the service, Amtrak Commuter is authorized to discontinue it. 95 Stat. 649. Congress plainly wants the States to take over these facilities, but it expressly refused to rescue State-owned railroads from the RLA procedures. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1157, 95 Stat. 681.

[19] In 1980 state and local subsidies provided 40.0% of the cost of transit operations across the nation and federal grants accounted for 17.3%. *Transit Fact Book* (1981 ed.), at 45. The federal program is scheduled for sharp reductions beginning in fiscal 1983 and elimination by fiscal 1985. Wall St. J., Oct. 22, 1981 at 29; N.Y. Times, Apr. 9, 1981, § B, at 13.

pollution control, energy and social welfare require that the State continue transit service. Provision of bus, subway and commuter rail facilities has thus become a critical component of the function of government in New York. In addition to their claim on public budgets, these services command as large a proportion of the time, attention and human resources of elected officials, civic groups, business interests and the press as any other service New York supplies. Simply put, the reason is that without public transit, the City of New York could not survive as a vital entity.[20]

The New York State Legislature attested to the public dependence upon transit service, including the LIRR, in 1981 when it declared "a transportation emergency" in the MTA district because the subway, bus and commuter railroad systems

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[20] 61% of the City's work force uses public transportation. School of Urban Sciences, University of Illinois, Moving People—An Introduction to Public Transportation, Jan. 1981 at 19. More significantly, 90% of all persons coming into the central business district each day arrive by public transportation. *Id.* at 5. Of course, interruption or even reduction of transit service causes traffic problems which affect everyone living or working in the area. For example, after Chicago was forced by budget shortfalls this year to increase fares and reduce transit services, ridership dropped 11.5% in one month and major arteries into the downtown section "have remained clogged by traffic for long periods every day." N.Y. Times, Oct. 18, 1981 at 32. Chicago's experience also indicates that labor relations are central to the City's transit difficulties—the employer is now seeking to renegotiate labor contracts and the union is challenging lay-offs in arbitration. *Id.*

The New York Court of Appeals has recognized this crucial link between transit service and the City's well-being:

> [F]or this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth reemphasizing that the subways are the city's arteries upon which its life and daily living depend***.

Lerner v. Casey, 2 N.Y.2d 355, 367, 161 N.Y.S.2d 7, 16 (1957), aff'd 357 U.S. 468 (1958) *quoting New York City Transit Authority v. Loos*, 2 Misc. 2d 733, 738, 154 N.Y.S.2d 209, 214 (1956). When a strike disrupted bus and subway service in 1980 for eleven days, the city economy lost more than one billion dollars. Cirrilo, *New Yorkers Ride Again*, Associated Press, April 12, 1980, *cited by* the court of appeals, Pet. App. 15a n.19.

"are faced with a need for additional capital funds . . . Unless such funds are obtained . . . the transit and transportation system servicing this district will deteriorate, and a clear and present danger would result to the health, safety and welfare of its inhabitants . . ." 1981 N. Y. Laws, ch. 314, § 1. The legislation authorized the MTA to proceed with its $7.9 billion plan for improvement of its subway, bus and commuter railroad system—a system which carries "six million passengers a day, or one out of every three persons who use public transit in the entire nation," and operates more vehicles "than all other transportation systems in the United States combined." *Id.* About $750 million of these capital improvements will be allocated to the LIRR, and another $750 million will be spent on other MTA commuter rail services. MTA Submission to the MTA Capital Program Review Board (Sept. 25, 1981).

In the constitutional sense, therefore, the provision of transit service by the State of New York is precisely the kind of function which government was "created to provide," *National League of Cities, supra,* 426 U.S. at 851, and precisely the kind of service the State has "traditionally afforded [its] citizens." *Id.* Respondents intend that statement not in the sense that the State of New York in 1800 or 1850 provided commuter rail service but rather to refer to the State's historic and traditional responsibility to provide those public services upon which the public most relies, and to respond to public needs for the services deemed most urgent at any particular time. At some time in the past, construction of a network of highways or provision of sanitation service was most essential to the economic and social well-being of the New York region. Tomorrow, the critical need may be different if economic and technological circumstances impose other responsibilities for the protection of the public upon the States or their subdivisions. At the present, the pressing need is for commuter rail service and other forms of mass transit.

Of course, the Constitution does not require that *any* service which the State chooses to provide be deemed immune from Federal commerce regulations. That is the point which

underlies this Court's distinctions between the problem presented in *National League of Cities* and cases that have applied Federal regulations of safety, employers' liability or labor relations to State-owned railroads. Those cases are clearly distinguishable from the instant action as well, because both the State Belt Railroad in *United States. v. California,* 297 U.S. 175 (1936), and *California v. Taylor,* 353 U.S. 553 (1957), and the Alabama railroad in *Parden v. Terminal R. Co.,* 377 U.S. 184 (1964), were solely involved in the carriage of freight. It is only the LIRR's carriage of a minimal amout of freight that serves to bring it within the terms of the Interstate Commerce Act, thereby eliminating any dispute regarding its coverage by the RLA. By contrast, in the rail freight cases, it was the specific nature of the States' function which warranted Federal regulation of their activities. In each instance, the State had elected to become involved in an activity generally and routinely provided by private investors. Both Alabama's Terminal Railway and the California State Belt Railroad performed commercial services for profit under statutory authority granted them by the State legislatures.[21] And much as South Dakota is

[21] Both the Alabama and California railroads operate under State charters, and both are obliged to apply their net proceeds to harbor or dock improvments, in much the same way the Port Authority of New York and New Jersey applies the net revenues from its bridge and tunnel facilities to offset losses in its commuter rail service, the PATH line between New Jersey and New York City. *See United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). Similarly, the MTA is authorized by State law to use the surplus revenues from the Triborough Bridge and Tunnel Authority for the benefit of its bus, subway and commuter rail transit services. N.Y. Pub. Auth. Law §§ 569 c.1, 1219-a, 1277-a (McKinney, 1970 & Supp. 1980-81) as amended by 1981 N.Y. Laws, ch. 314. The statement made by Petitioner that the State Belt Railroad operated "without profit" is both irrelevant and misleading. It is irrelevant to the determination whether it was the kind of service also provided by private investors, and it is misleading in that the statutory scheme allocated the net revenues or "profits," which certainly existed, to harbor improvements. In the sense of "without profit for investors," it was a non-profit activity, but it was not unprofitable in the more usual sense of revenues exceeding expenses. By comparision, LIRR revenues from rail service amount to only about 44% of the cost of operations, with public subsidies making up the difference.

currently involved in the manufacture of concrete, *see Reeves, Inc. v. Stake,* 447 U.S. 429 (1980), the States' involvement in interstate transportation of freight by rail was largely a result of historical circumstance.

Immunity from commerce regulation is not governed by an assessment whether an activity is or is not profitable—respondents do not urge the kind of "proprietary"—"governmental" distinction rejected by the Court in *New York v. United States,* 326 U.S. 572 (1946). Rather, there was no immunity from Federal commerce regulations for the California or Alabama railroads because the States were not involved in any way in the kind of activity for which governments are created. They were not engaged in administering public law; nor were they furnishing those public services upon which the public welfare depends. By contrast, the people of New York have an extraordinary and special need for public transportation, which only the State of New York is available to satisfy. In this respect, transit, including the Long Island Railroad, is indistinguishable from police protection, fire prevention, sanitation, parks and recreation—each a service on which the people truly depend. Nor is the immunity sacrificed because there exist private forms of transportation, such as the automobile, or because the rider pays a part of the cost of the LIRR service, any more than the State's immunity can be lost because there exist private security companies and proprietary hospitals, or because in a particular State there is a special assessment for garbage pick-up.

There can surely be no doubt that the Long Island Railroad is an integral part of the transit system of the New York region,[22] and an integral part of the State's traditional

[22] But for the insistence by Petitioner to the contrary, the classification of the LIRR as a transit service would seem self-evident. *See* Pet. Brief at 40-41. Virtually all the railroad's daily riders are engaged in the kind of same-day trips which characterize "transit" facilities. About 70% of all daily passengers are work-to-home and home-to-work commuters. Jt. App. 35. Summer transport to Eastern Long Island beaches, emphasized by Petitioner, accounts in fact for a small fraction of LIRR service. Trips to and from the vacation area amounted to under 0.5% of all passengers in 1979. MTA 1979

function of providing those public services most needed by the people in circumstances where there is no private sector alternative to the public service. Even those persons in New York who never ride the railroad or the subways are entirely dependent upon their existence. Abandonment would strangle the economy of the city and cause havoc for all New Yorkers.

Petitioner and *amicus* United States press the contention that notwithstanding the vital public need which is served by the LIRR in the provision of commuter transit service, its protection from Federal commands issued under the commerce clause disappears because the State also uses its railroad to transport some freight cars from Queens, where they can be interchanged with interstate freight trains, to points on Long Island. If the constitutional immunity otherwise exists, it cannot possibly be sacrificed because 4% of the railroad's revenue—or 0.5% of the MTA's expense budget of $2.4 billion in 1981, MTA 1981 Operating Budgets, or the work of 307 of the Authority's 53,000 employees—relates to freight rail service.[23]

(footnote continued)
Annual Report, at 8; LIRR Report of Station Ticket Sales. The American Public Transit Association includes commuter railroads in its record-keeping for "transit systems." *Transit Fact Book* (1978-1979 ed,), at 3-9, 48-49. Congress includes commuter rail services in its definition of eligible recipients for mass transit grants, and bases the formula for distributing two-thirds of the "third tier" of its Sec. 5 Operating Aid on the number of commuter rail miles operated in a particular area, 49 U.S.C. § 1694(a)(3)(A)(i) (Supp. III 1979). The House Report on the Urban Mass Transportation Act of 1964 routinely referred to commuter rail in general and the LIRR in particular as part of the transit industry. H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News at 2575, 2576, 2577, 2579, 2580, 2590, 2591. The press obviously regards commuter railroads as part of "transit" services. *E.g.*, N.Y. Times, July 2, 1981, at 1; Philadelphia Bulletin, July 5, 1981, at 1.

[23] Petitioners emphasize that twelve of eighteen commuter rail services are privately owned, Pet. Brief at 14. In fact, by 1980 only ten of these lines remained. *Transit Fact Book* (1981 ed.) at 18-19. They ignore, however, that all eighteen lines depend upon State and local subsidies so that in 1980 expenses ($973 million) exceeded operating revenues ($436 million) by $537 million, up from a total deficit of $408 million in 1978. *Transit Fact Book* (1978-1979 ed.) at 74-75; (1981 ed.) at 69. The values of State sovereignty would be

Our Constitution has endured because of its capacity to adapt to changing economic and social environments unforeseen by its draftsmen. The framers cared not whether sanitation service or transit was then, or would become, a State function, for they foresaw that the role of State government was destined to change as economic and technological developments placed new items on its agenda and removed others from the list of concerns. Even today, where commuter rail transit is vital to the economic and social well-being of New York, some other transit mode may be needed in another state. Tomorrow, sanitation service may fall under private control in one part of the country, but consume the largest part of public budgets and governmental attention in another.

The scope of the immunity from Federal regulation which safeguards the States' sovereignty need not be readjusted to each shift in the economy. It must be rooted instead in government's need for the autonomy to choose among competing demands for essential services, and to allocate its limited resources to those services which best serve the public welfare. If this process of choice is the essence of sovereignty, commuter rail service surely qualifies as a "traditional" governmental function, for it is precisely the kind of service the government of the State of New York was created to provide. The MTA and LIRR are thus entitled to application of the immunity secured by *National League of Cities* against commerce regulations displacing the State's freedom to make sovereign decisions.

(footnote continued)
fragile indeed, if a State jeopardized its autonomy by making available its intrastate transit facilities for some freight shippers. The standard urged by the UTU would reduce *National League of Cities* from a crucial restatement of the federalism values embedded in the Constitution to an aberrant ruling of no enduring significance. While some may urge just that result, *National League of Cities* itself brims with recognition of the Court's responsibility to protect the States against national regulations which impair their effectiveness in the Federal system.

B. THE STATE'S POWER TO STRUCTURE ITS RELATIONS WITH ITS EMPLOYEES IS A BASIC ATTRIBUTE OF ITS SOVEREIGNTY.

In *National League of Cities*, the Court concluded that both the minimum wage and maximum hour regulations of the Fair Labor Standards Act "impermissibly interfere[d] with the integral governmental functions of [States and local governments]." 426 U.S. at 851. Among the congressional commands which unconstitutionally infringed State sovereignty were the requirement that overtime be compensated in cash and not in time off; the submission to the courts of the issue whether a person was an employee or a "volunteer"; and the effect of the minimum wage on the government's capacity to offer summer jobs to teenagers or employment to casual workers. 426 U.S. at 850-852. These employment decisions were deemed to be attributes of sovereignty regardless of any "particularized assessments of actual impact" on state or local governments. 426 U.S. at 851. If a State's decision to employ teenagers at less than the minimum wage, to structure police work schedules into 24-hour shifts, or to offer compensatory time off to its secretarial staff are attributes of sovereignty, then the freedom to structure employee relations for thousands of commuter railroad employees must surely qualify.[24]

The introduction of collective bargaining and union organization into the relation between government and its employees has had a profound impact on the political process. The question whether that effect is or is not salutary is a matter for legislative judgment, not at issue in this case. But there can be no doubt that the establishment of bargaining procedures for public employees, including legislative protection of their right to join a labor organization and to negotiate collectively, has the effect of singling out one of the interest groups contending for scarce public resources—the public workers and their

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[24] Wages and benefits account for about 75% of operating expenses in the transit industry. Institute of Public Administration, Financing Transit: Alternatives for Local Government, July, 1979, at 8; *Transit Fact Book*, (1981 ed.) at 49.

unions—and affording them a special vehicle for participating in the political process by which those resources are allocated. *See generally,* H. Wellington and R. Winter, The Unions and the Cities (1972). For all other groups, including welfare recipients, commuters, small businessmen and consumers, there remains only the right to petition elected officials. But once collective bargaining is introduced to government labor relations, employees enjoy by legislative sanction a special means for putting pressure on State government.

Some see this choice as necessary to assure just treatment and participation to public employees in the process of determining the conditions of their work. Others view the process of bargaining with public workers as an excessive delegation by the government of its responsibility for employment decisions. *See, e.g.,* B. Aaron, J. Grodin, J. Stern (eds.), Public Sector Bargaining (1979); H. Wellington and R. Winter, The Unions and the Cities (1972); D. Stanley, Managing Local Government Under Union Pressure (1972). Whatever one's view of the merits, it is plain that the determination of policy in this area is one of the most important sovereign choices made by any State.

Across the country there are wide variations in labor relations procedures for government employees. *See Summary of State Labor Laws,* 1 [Ref. File] Gov't Empl. Rel. Rep. (BNA) 51:501-30 (April 20, 1981). Without exception, however, the choices made by governments vary dramatically from the policy choices now well established in the private sector of the economy under the National Labor Relations Act and the Railway Labor Act. *Compare* ch. 7 *and* ch. 11 in D. Bok and J. Dunlop, Labor and the American Community (1970).

The Taylor Law differs from the Railway Labor Act in several critical respects:

(1) Like virtually every State labor relations statute, the Taylor Law bans all strikes by public employees, and provides statutory penalties for violations of that prohibition. *See Summary of State Labor Laws, supra.* Prohibit-

ing the right to strike does not always eliminate the strike threat from bargaining, but the penalties provided in the statute or available in State courts are evidence of the State's considered decision that the strike weapon is inconsistent with government's sovereign responsibilities for the assurance of uninterrupted service, as well as the State's considered decision that legalizing strikes by government workers would distort the political process by giving public unions an excessive influence over government's allocative decisions. Even if one disagrees with that analysis, no one can doubt that the force of the argument has so far prevailed in legislative debates throughout the country for Federal, 5 U.S.C. §7311 (1976), as well as State and local workers.

(2) While the Railway Labor Act favors craft-based bargaining units—an emphasis which accounts for the fragmentation of the LIRR's work force into 23 separate units—the Taylor Law calls for the fewest possible units consistent with fair treatment for public employees.[25] As a result, in the bus and subway systems where employees perform tasks similar to those of LIRR workers, operating and maintenance employees are organized along industrial lines into one unit covering a variety of different skills and classifications.

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[25] The employees themselves have considerable influence over the determination of separate craft units. *In re Long Island Railroad Company*, 8 NMB No. 89 (1981), 45 U.S.C. § 151, cl. Fifth, § 152, cl. Fourth (1976). By contrast, the New York legislature provided for protection against this kind of fragmentation of bargaining units. N.Y. Civ. Serv. Law § 207(1)(c); *Final Report of the Governor's Committee on Public Employee Relations* (1966) at 10-13; *Civil Service Employees Ass'n v. Helsby*, 25 N.Y.2d 842, 303 N.Y.S.2d 690, 250 N.E. 2d 731 (1969) (only five units designated for 150,000 State government employees). Unlike the Federal sanction of "an appropriate unit," the New York State Public Employment Relations Board has consistently found that the "most appropriate unit is one which joins the greatest number of employees possible without risking conflicts within the group." *E.g., In re Board of Education of the City of New York*, 6 PERB ¶6-4011 (1973); *In re Malone Cent. Sch. Dist.* 1 PERB ¶1-399.29 (1968). Under the New York law, occupational or craft differences "do not warrant fragmentation" of units for bargaining. *In re BOCES, Nassau County*, 4 PERB ¶4-4021 (1971).

(3) While the Long Island Railroad has been obliged under the Railway Labor Act to bargain over pensions, the New York Legislature, after a brief experience under the Taylor Law, decided to eliminate this subject from the negotiation process. 1973 N.Y. Laws, ch. 382 §6; N.Y. Civ. Serv. Law §201, cl.4 (McKinney Supp. 1980-81).

(4) Finally, in many other areas—including judicial review of arbitration awards, rules of access to employer's property during organizational campaigns, the lawful scope of mandatory bargaining, the relationship of collective bargaining to the obligations imposed on employers by other public laws, the union's duty of fair representation, the administrative board's power to remedy unfair labor practices, the availability of injunctive relief against concerted activity by employees, the scope of protected concerted activity, and a host of other issues—both the statutory framework and the decisions of courts and administrative agencies differ widely, reflecting the basic fact that the constraints which shape employment relations in the public sector differ from those which influence employment relations in the public sector of the economy. Not the market but the political process guides participants in government labor relations. The difference is substantial; it is reflected throughout the legal rules, precedents and practices.

Once a service industry like the Long Island Railroad comes under government's control, it is obliged to function under the standards applicable to government. Whatever the appeal of private sector "efficiency," a government cannot be run like a business because the pressures, the demands and the obligations are not the same.[26] Government agencies, in-

[26] The labor relations experts who drafted the Taylor Law explained this point in their *Final Report* submitted to Governor Rockefeller on March 31, 1966: "Collective bargaining including the right to strike, is recognized as an essential democratic right of employees in the private enterprise sector . . . Instead of the constraints of the market place on collective bargaining, including the right to strike . . . negotiations in the public sector are subject to the constraints imposed by democratic political processes . . . a strike by

cluding the MTA and the LIRR, exist primarily to serve the public welfare by providing services upon which the public depends. Private businesses exists in the marketplace. To succeed, they must supply goods and services the public wants; to survive, they must do so on a profitable basis by competing successfully with other groups. Competition imposes realistic constraints on the process of collective bargaining. No private entrepreneur could operate the Long Island Railroad today. If one existed, the State of New York would not have taken over the line and expended hundreds of millions since 1966 to maintain the service. And when a State structures the kind of employment decisions involved here—decisions even more critical to the government's interest than the choices at issue in *National League of Cities*—it exercises the freedom over integral decisions which is the cornerstone of its separate and independent sovereign existence.

Petitioner and *amicus* United States attempt to evade these realities by suggesting that the choices made by New York in adopting the Taylor Law are somehow "merely procedural", and not sufficiently important to government's functions to qualify as "matters indisputably 'attributes of sovereignty'." *National League of Cities,* 426 U.S. at 854; *Hodel v. Virginia Surface Mining and Reclamation Association,* slip op. at 21. The argument seeks to gainsay the fact that the way the State chooses to structure its own employer-employee relations fundamentally affects every service it provides, every budget determination it makes and every public law administered by an agency of the State or its subdivisions. Nothing could be more plain than the proposition that a lawful right to strike or a craft-based principle of union organization would have a fundamental effect on New York's basic policy choices.

(footnote continued)
government employees (there can scarcely be a countervailing lockout) introduces an alien force in the legislative processes." *Final Report,* Committee on Public Employee Relations, at 14-15. The market constraints which discipline the parties to collective bargaining in the private sector include the risk that customers faced with a disruption of service because of a strike will find substitutes for that service. When a strike stops operations on a freight railroad, shippers may resort to truck transport. No substitute exists, though, for the rail transit service upon which 260,000 LIRR daily passengers depend.

If a State were to decide, as almost half the States still do, to eliminate collective negotiation in government and return to unilateral determination of wages, hours and working conditions by the employer, it would surely matter to the State's freedom whether the Federal government could step in to prescribe application of the National Labor Relations Act or the Railway Labor Act to employees providing essential State services. If, on the other hand, the State chose to have labor contracts settled by binding arbitration—as many States, including New York, now provide for certain types of employees, such as police and fire units—it would also surely affect its freedom to make essential decisions if the Federal government intervened with regulations authorizing these unions to strike, by placing them under the jurisdiction of the Railway Labor Act or the National Labor Relations Act. In either case, this Court would surely have no difficulty perceiving that the Federal regulation addressed matters "indisputably attributes of state sovereignty." But a choice of precisely the same quality and magnitude is what is at issue here in the application of the Railway Labor Act to the Long Island Railroad.

It can be no answer to call these choices merely "procedural." They go directly to the heart of the allocation of political responsibility between elected representatives and private interest groups or private associations of employees. Whether the congressional choice is more just or more equitable is not the issue. Short of abridging some specific constitutional right, *see Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), the State's freedom to decide these vital employment relations matters affirmatively limits the Federal government's authority to regulate commerce. This is so because, as this Court said in *National League of Cities,* the "State is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy, *Kovacs v. Cooper,* 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), but is itself a coordinate element in the system established by the framers for governing our Federal Union." 426 U.S. at 849.

II. THE FEDERAL INTEREST IN THE APPLICATION OF THE RAILWAY LABOR ACT TO THE LONG ISLAND RAILROAD IS NOT SO "DEMONSTRABLY GREATER" AS TO JUSTIFY STATE SUBMISSION.

Both the RLA, and the Taylor Law serve the governmental interest of avoiding interruptions in service by providing for orderly settlement of labor disputes. But that general statement of common interest belies the altogether different perspectives of the two statutes.

In adopting the RLA in 1926, Congress was concerned with regulating labor relationships in private, investor-owned transportation companies. The legislators began with the premise that through free and unfettered collective bargaining, including the possibility of a strike or lockout, disruptive disputes might be minimized without involving the government in the determination of working conditions. Collective freedom of contract was substituted for the individual contract of hire, in order to secure the associational rights of workers and to regularize the process of voluntary wage determination.

In the Taylor Law, by contrast, there was no issue of minimizing government's role. Government is the employer. By adopting that law, the legislature decided to share some of its responsibility for wage determination with employee representatives through the process of collective negotiation. It also decided to secure the government and the political process against the effects of strikes by public workers.

Seen in this light, the State's interest in designing employee relations procedures is paramount. While the State is, in effect, designing and affecting its own political process, the Federal interest is truly trivial. Only the small fraction of freight service on the LIRR establishes National Mediation Board jurisdiction over the line. In 96% of its activity as measured by revenue, or 98% as measured by railcar mileage, the LIRR is an intrastate passenger line outside any congressional concern expressed in the RLA. Against the State's concern that the employees not exercise more influence over policy determination, the Federal interest in uniformity has little impact.

The Federal concern here pales when contrasted with the emergency legislation to combat a severe inflation rate "which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." *Fry v. United States,* 421 U.S. 542, 548 (1975); 426 U.S. at 853. In addition, since the statute at issue in *Fry* simply froze wage scales and imposed no affirmative burdens on the State, the interference with State choices was small. This factor, too, supports the Court's decision rejecting the claim of the State in that case. In the area of environmental protection, the Federal interest in uniform application of regulations may also be stronger, given the possibility that non-compliance by State facilities could frustrate achievement of the Federal goal. *See, e.g., Friends of the Earth v. Carey,* 552 F.2d 25 (2d Cir.), *cert. denied,* 434 U.S. 902 (1977). No risk of that sort exists here. To recognize the State's choice in the Taylor Law of a method for affording protection against interruptions in service will have no effect on the 99.9% of all freight railroad activity still subject to Federal labor procedures.

Even if the State's immunity might be forced to submit to a greater Federal interest in some other case, the RLA offers no foundation for such a conclusion here. Any evaluation comparing the effect of the Federal regulations upon national interests with its decisive impact on State sovereignty compels a judgment invalidating the application of the Railway Labor Act to the Long Island Railroad.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, and the Railway Labor Act declared invalid as applied to the Long Island Railroad.

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